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No. 06-1156

In the Supreme Court of the United States

NIGHT VISION CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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ARGUMENT[1]

If it stands, the Federal Circuit's decision will reshape the law on two issues in a way that will have broad, lasting and harmful implications for the Government and government contractors. Critically, the Circuit's decision threatens to defeat Congressional intent by nullifying a system of incentives and protections that were put in place to remedy Government discrimination against small business contractors, and to promote innovation. Because the legal issues at stake are uniquely within the Federal Circuit's jurisdiction, unless this Court intervenes the Federal Circuit will almost certainly have the last (and only) word on these issues. The issues are thus ripe and worthy of review by this Court.

In the Petition, NVC identified and discussed the various reasons why this case is important and worthy of review. It is revealing that the Government does not challenge these reasons, except to make the obvious point that the Federal Circuit's ruling "does not conflict with any ruling from this Court or other court of appeals." (Brief in Opposition ("Opposition Brief") 6.) Of course, this *must* be true because, as explained in the Petition (Pet. 15, 17-18), the Circuit's ruling is the first—and likely the last—word on both issues.

Instead, the Opposition Brief focuses almost exclusively on the merits of the rulings below. The reason for this Reply is that, in its discussion of the merits, the Opposition Brief raises new arguments as to some issues, and creates confusion as to others.

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[1] Defined terms and abbreviations used in this Reply have the same meaning ascribed to them in the Petition for Writ of Certiorari (the "Petition").

I. The Opposition Brief's Arguments Regarding Count II

The Opposition Brief's discussion of Count II is noteworthy for two reasons: *first*, the Government tries to raise an issue that it waived by not arguing it on appeal; and *second*, its arguments actually *reinforce* why this case is so important and appropriate for review by this Court.

A. The Government Waived Any Argument That Relevant Laws Are Not Incorporated Into Contracts

NVC's written contract claim in Count II alleges that §638—in particular, its mandate regarding Phase III contract awards—was incorporated by law into the SBIR Phase II contract. (Am. Compl. ¶¶89-98.) NVC maintains that this is so because of the fundamental legal principle that "[t]he law in effect when a government contract is made becomes a part of the contract." (*See* Pet. App. 7, 50, n.18.) Neither court below questioned this underlying legal principle. (*Id.*) On the contrary, the Court of Federal Claims recognized that this principle is "beyond doubt." (Pet. App. 50, n. 18.) And the Government itself conceded the point in the Federal Circuit. (*See* April 24, 2006 Brief For Defendant-Appellee, p. 4 ("the principle that a contract will be read as incorporating relevant statutes and regulations" is "undisputed").) Nevertheless, the Opposition Brief now argues that NVC "has failed to demonstrate" that §638 (irrespective of what it means or requires of the Government) "could be deemed incorporated into the contracts." (Opp. Br. 7-8.) Because it conceded the point on appeal, the Government waived it, *U.S. v. Ford Motor Co.*, 463 F.3d 1267, 1276-77 (Fed. Cir. 2006), and this Court should disregard it.

B. The Government's Arguments Reinforce The Importance Of This Case

The Federal Circuit affirmed the dismissal of Count II because it found that §638 imposes *no duty* on the Government and creates *no rights* for private entities. As NVC explained in its Petition, if this ruling is allowed to stand, SBIR contractors and small business will lose the essential protections and incentives that Congress intended to confer through SBIR, and the Government will lose the ability to attract innovative technology from small businesses. (Pet. 15, 18-19.)

The Opposition Brief confirms that NVC's gloomy predictions are well founded, and that the Federal Circuit's ruling below is every bit as broad as NVC described it in the Petition. In particular, the Government states:

> The court of appeals correctly held that Section 638(j)(2)(C) creates no entitlement. Rather, the statute requires only that the SBA (and not any other agency) is to modify its policy directives.

(Opp. Br. 6-7; citation and footnote omitted.) Likewise, the Government endorses what it calls the Federal Circuit's "plain-language interpretation" that §638 "deals with 'procedures' to accomplish the statutory objective" and "does not mandate particular action to achieve those results." (*Id.* 7.)

In short, notwithstanding the parties' many disputes regarding the *merits* of the case, there is *no* dispute as to the scope of the Circuit's ruling below. If the ruling stands, §638(j)(2)(C)—one of the principal protections in the SBIR Laws—will be gutted. Agencies will, once again, have unfettered discretion to deny SBIR Developers the financial reward for the Government's use of their innovations—*i.e.*, the Phase III contracts. And SBIR's objective—to correct the inclination of the executive branch,

when left unchecked, to make procurement decisions that discriminate against small business and inhibit innovation—will have been defeated. (Pet. 4-5, 19.) This Court should reject the Circuit's attempt to render §638(j)(2)(C) meaningless. If it does not do so—and allows the Circuit's decision to stand—the Government will have the very discretion that Congress attempted to take away.

II. The Opposition Brief's Arguments Regarding Count III

It is somewhat surprising that, after admitting that the SBIR Policy Directive requires agencies to "give special acquisition preference" to SBIR Developers (Opp. Br. 3), the Government turns around and argues that the Air Force's oral promise to NVC—which did exactly that—was *unauthorized*. (*Id.* 8-10.) At the very least, SBIR laws surely *authorize* Contracting Officers to make the kind of commitment NVC alleges in Count III, even if (as the Circuit held in dismissing Count II) they do not *mandate* it. (*See* Pet. App. 10).

In its attempt to support the Federal Circuit's dismissal of Count III, the Government makes various erroneous and misleading characterizations of the Air Force's promise to NVC that is the basis of Count III. Because the sole ground for the Federal Circuit's disposition of Count III was the Circuit's finding that the Air Force Contracting Officer lacked authority to make the alleged promise, the erroneous descriptions of the alleged promise are critical and must be corrected.

A. The Air Force's Oral Promise

The Air Force promised NVC that *if*—but only if—Phase II succeeded *and* the Air Force decided to pursue the

PNVG technology, the ensuing (*i.e.*, Phase III) contract would go to NVC. (Pet. 9-10, 27.) The fact that the contract the Air Force (conditionally) promised to NVC would be a "Phase III" contract is not merely NVC's factual allegation, but the necessary legal consequence of any decision by the Government to pursue Phase II's PNVG technology. (*E.g.*, Pet. 6, citing 67 FR 60072, 60085.) According to the SBIR Policy Directive, which is binding on agencies, "work that derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements, but is funded by sources other than the SBIR Program" is, by definition, "Phase III." (*Id.*) This is a point of law that the Government occasionally ignores, but has never disputed. Thus, the actionable promise alleged in Count III is neither: (a) an oral Phase III contract; nor (b) an unconditional promise that the Air Force would award a Phase III contract at all.

B. The Government's Inaccurate Characterization

The Government does not appreciate—or simply has ignored—the foregoing distinction. The Opposition Brief describes the second "Question Presented" as follows:

> Whether the court of appeals correctly held that an Air Force contracting officer lacked authority to form an oral or implied-in-fact contract obligating the United States to award petitioner a Phase III contract.

(Opp. Br. (I); *see also id.* 8 ("Petitioner alleges that the Air Force contracting officer promised petitioner a Phase III contract").) Yet, the issue is not that simple. The Government's statement of the issue fails to acknowledge that the promise was *conditional*, and it did not obligate the Air Force to proceed to Phase III—*i.e.*, the Air Force promised only that *if* it decided to pursue the PNVG beyond Phase II, the Phase III contract would go to NVC.

C. When Count III Is Properly Understood, The Flaws In The Government's And Federal Circuit's Reasoning Are Apparent

The Federal Circuit disposed of Count III for one reason: it (erroneously) held that the authority of a Contracting Officer "does not include determining the type of procurement to be used for a particular transaction." (Pet. App. 11.) As explained in the Petition, this ruling is unsupported by *any* legal authority, and it contradicts the established rule that implied authority exists where: (i) the alleged promise is "within the scope of the subject matter" of the Contracting Officer's assignment, and (ii) no published law restricts the Contracting Officer's authority to make such a promise. (Pet. 27-30.) These points are adequately covered in the Petition, and will not be repeated here.

However, the point that is important here—and the point that seems to be lost on the Government—is that the Circuit's ruling is *factually* unsupported as well. The Circuit's factual error is somewhat obscured in the Opposition Brief by the Government's mischaracterization of NVC's underlying claim. When the claim is properly understood, the flaws in the Government's—and Circuit's—reasoning are apparent.

Contrary to the Circuit's ruling, the Air Force's promise to NVC did not "determine the type of procurement to be used." The SBIR Laws, themselves, did so by providing that *any* contract that "derives from, extends or logically concludes" work performed in Phase II *is* a "Phase III" contract. 67 FR 60067, 60085. NVC was not promised that there would be a Phase III; it was promised that *if* the Air Force decided to pursue the PNVG technology (a matter wholly within the Air Force's discretion), the contract (*i.e.*, Phase III) would go to NVC on a *sole source*

basis. (Am. Compl. ¶101).[2]

The Government's attempt to prop up the Federal Circuit's unsupported ruling fails. The Opposition Brief (at 9) cites two authorities—the Court of Federal Claims opinion below (Pet. App. 59), and *Harbert/Lummus Agrifuels Projects v. U.S.*, 142 F.3d 1429 (Fed. Cir. 1998)—neither of which supports the Government's arguments. The Court of Federal Claims opinion discusses procedural prerequisites for a *Phase III contract*. (*See* Pet. App. 59-60 (identifying solicitations, proposals and written documents as procedural prerequisites for *Phase III* contracts).) This has no bearing on Count III because NVC does not allege that it had an oral Phase III contract. Indeed, the oral/implied contract arose long before the Air Force had even decided whether to pursue Phase III. In fact, it would only be *after* the Air Force decided to pursue Phase II's technology (and, thus, to proceed to Phase III) that the Phase III agency procedures would come into play. And, by then, pursuant to the oral/implied contract, the only party that could have received the Phase III contract was NVC.

The *Harbert/Lummus* case is inapposite. First of all, it does *not* hold that Contracting Officers lack authority to determine the "form" or "type" of a procurement. Further, that case concerned an alleged oral promise from a contracting officer whose official delegation of contracting authority provided that he *lacked authority to make oral*

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[2] The Government admits that the "IPNVG" technology that the Air Force pursued after Phase II was "similar to petitioner's PNVGs." (Opp. Br. 4.) Thus, the IPNVG contract "derived from" work performed in Phase II, and *was* "Phase III." The Government breached its oral/implied contract with NVC by purporting to "compete" the contract instead of awarding it to NVC on a sole source basis.

contracts. 142 F.3d at 1432. There is no such evidence in the record here.

The Government also argues that "there must be special funding" for a Phase III contract, and "a contracting officer does not have authority to make that funding decision unilaterally." (Opp. Br. 9, citing 15 USC §638(e)(4)(C)). Again, this is irrelevant. The availability of funding goes to the question of *whether* there would be a Phase III—not *who* would receive the contract. The actionable promise alleged in Count III did not include a promise that there *would be* a Phase III.

D. FAR 2.101 Does Not Prohibit Oral Contracts

In a last ditch effort to explain how it could be that a Contracting Officer could lack authority to make contracts, the Government resurrects a point that it unsuccessfully argued to the Federal Circuit. It argues that Federal Acquisition Regulation ("FAR") Section 2.101 prohibits *all* oral contracts and, therefore, the ruling below should stand even if the reasoning was erroneous. (Opp. Br. 10.) The argument fails for several reasons, all of which are set out in greater detail in NVC's briefs filed in the Federal Circuit.[3] In summary: (1) several cases, including at least one in the Federal Circuit, recognize that the Government can be bound by oral contracts, *e.g., H. Landau & Co. v. U.S.*, 886 F.2d 322, 324 (Fed. Cir. 1989); (2) the Ninth Circuit has squarely rejected the argument that FAR 2.101 bars oral contracts, *Pacord v. U.S.*, 139 F.2d 1320, 1323 (9th Cir. 1998); (3) FAR 2.101 does not purport to prohibit or regulate *anything*, it merely defines various terms; and

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[3] *See* March 13, 2006 Appellate Brief of Night Vision Corp., pp. 55-59, and June 2, 2006 Reply Brief of Night Vision Corp. pp 27-29, both filed in the Federal Circuit.

(4) a Contracting Officer's authority to contract can be limited only through a published law or other means that places contractors on notice, *see Brunner v. U.S.*, No. 98-554C, 2006 WL 1189492, *12, 23 (Ct. Cl. May 2, 2006), but nothing in FAR 2.101, or any other law or fact in the record, provided NVC with notice that the Air Force Contracting Officer for the PNVG program lacked authority to make the contract alleged in Count III.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, the Court should grant the Petition and ultimately reverse the decision of the Federal Circuit.

Respectfully submitted,

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